

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 18, 2008

THOMAS JOHNSON v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Knox County
No. 87956 Richard Baumgartner, Judge**

No. E2007-02879-CCA-R3-PC - Filed January 8, 2009

In 2002, the Petitioner, Thomas Johnson, was convicted of second degree murder. In 2007, he filed a petition seeking post-conviction relief. The post-conviction court dismissed the petition as untimely. On appeal, the Petitioner claims that the post-conviction court erred when it dismissed his petition because his case falls within an exception to the statute of limitations period. After a thorough review of the record and the applicable law, we affirm the post-conviction court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Thomas Johnson, Whiteville, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Sophia S. Lee, Assistant Attorney General; Randall E. Nichols, District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Procedural History

The Petitioner pled guilty on May 15, 2002, to one count of second degree murder. Because he did not file an appeal, the judgment became final on June 15, 2002. The Petitioner then filed a petition for post-conviction relief on October 30, 2007. The trial court denied relief, citing the Petitioner's failure to file within the limitations period. It is from this judgment that the Petitioner

now appeals.

II. Analysis

On appeal, the Petitioner argues that, after he was convicted, the courts have recognized a new constitutional right with *Blakely v. Washington*, and its progeny. 542 U.S. 296 (2004). He claims that *Blakely* applies retroactively to his case and that his delay in filing his petition for post-conviction relief fell within a statutory exception to the statute of limitations. The State responds that *Blakely* is not retroactive and that, as such, it does not define a new constitutional right. The State argues that the post-conviction court properly dismissed the Petitioner's claim for relief based on an expired statute of limitations. We agree with the State.

Tennessee Code Annotated section 40-30-102(a) provides that a petition for post-conviction relief must be filed "within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred." (2006). There are several exceptions to the statute of limitations, which require that the Petitioner allege one of the following:

(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial

T.C.A. § 40-30-102(b)(1) (2006). If a petition "plainly" violates the statute of limitations, then the trial court "shall enter an order dismissing the petition" for post-conviction relief. T.C.A. § 40-30-106(b) (2006).

We disagree with the Petitioner's contentions that *Blakely* defines a new constitutional rule of law, which is a legal basis for post-conviction relief, even if the statute of limitations has run. *Blakely v. Washington* and its progeny held that any fact other than a prior conviction must be found by a jury in order to be used to increase a defendant's sentence beyond the prescribed statutory maximum. 542 U.S. at 301; *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Cunningham v. California*, 549 U.S. 270 (2007); *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007). This Court has repeatedly held that *Blakely* and its progeny did not create a new rule of law which was entitled to retroactive application to cases on collateral review. See e.g., *Glen Cook v. State*, No. W2006-01514-CCA-R3-PC, 2008 WL 821532, at *10 (Tenn. Crim. App., Jackson, Mar. 27, 2008);

Billy Merle Meeks v. Ricky J. Bell, Warden, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486, at *7-8 (Tenn. Crim. App., Nashville, Apr. 7, 2008); *Donald Branch v. State*, No. W2003-03042-CCA-R3-PC, 2004 WL 2996894, at *9-10 (Tenn. Crim. App., at Jackson, Dec. 21, 2004), *perm. app. denied* (Tenn. May 23, 2005). In light of *Cook*, *Meeks*, and *Branch*, the Petitioner has not established that his petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized when he pled guilty. As such, the Petitioner's claim does not fall within a statutory exception to the statute of limitations for the filing of post-conviction petitions.

Without an applicable statutory exception, we conclude that the Petitioner filed his petition for post-conviction relief beyond the one year statute of limitations. The Petitioner's judgment became final on June 15, 2002, giving him one year from that date to file his petition for post-conviction relief.¹ He did not file his petition until October 30, 2007. The trial court properly dismissed the Petitioner's petition for post-conviction relief as being untimely filed. The Petitioner is not entitled to relief.

IV. Conclusion

After a thorough review of the record and the applicable law, we conclude that the trial court properly dismissed the Petitioner's petition for post-conviction relief. We affirm the post-conviction court's judgment.

ROBERT W. WEDEMEYER, JUDGE

¹ We note that a copy of the judgment of conviction is not included in the record on appeal. However, the pertinent dates set out in our opinion are recited in the post-conviction court's order and are not disputed by the Petitioner or by the State.